

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:CTM:LA:2:POSTF-116422-02
KHAnkeny

date: July 29, 2002

to: LARRY BENJAMIN
Examiner (LMSB)

from: KATHERINE H. ANKENY
Attorney (LMSB)

subject: **Forms 872-I after a reorganization**

This memorandum responds to your request for assistance at our July 8, 2002 meeting. This memorandum should not be cited as precedent.

ISSUE

How should Exam draft the Forms 872-I for the [REDACTED] Inc. and subsidiaries consolidated group for the tax years immediately preceding the [REDACTED] reorganization?

CONCLUSION

An authorized representative of [REDACTED] Inc. should sign the Forms 872-I because [REDACTED] Inc. was the common parent of the consolidated group during those tax years. Treas. Reg. § 1.1502-77A(e)(4)(i). The year-end dates should be identified as [REDACTED] and [REDACTED] as requested by the Tax Director in her [REDACTED] and [REDACTED] letters.

FACTS

In [REDACTED] Inc. was the parent of a consolidated group. According to Moody's Company Data Report, in [REDACTED] Inc. acquired additional subsidiaries.

In [REDACTED] acquired [REDACTED] % of the stock of [REDACTED] Inc. for approximately \$[REDACTED]. [REDACTED] then merged into [REDACTED] Inc., with [REDACTED] Inc. surviving as an indirect, wholly owned subsidiary of [REDACTED] a [REDACTED]

company. According to [REDACTED]'s consolidated balance sheet, this acquisition price represented approximately [REDACTED] of the total value of [REDACTED]'s holdings.

In the consolidated return for the [REDACTED] short tax year, [REDACTED] Inc. claimed a \$[REDACTED] loss. [REDACTED] Inc. then filed amended returns for the consolidated group's [REDACTED] and [REDACTED] tax years, carrying back a substantial portion of that net operating loss. The refund claims of [REDACTED] Inc. will be submitted to the Joint Committee on Taxation.

It is unclear when the [REDACTED] short tax year ended. On its [REDACTED] Form 1120, [REDACTED] Inc. listed the year-end date as [REDACTED]. According to Moody's Company Data Report, the acquisition took place on [REDACTED]. As explained in the [REDACTED] letter from the Tax Director of [REDACTED] Inc. to IRS Counsel, the actual stock certificate is dated [REDACTED]. The Tax Director stated that [REDACTED] Inc. used [REDACTED] as the year-end date because that was the date used for financial reporting purposes. She requested that the "IRS [recognize] [REDACTED] as the year end."

It also is unclear when the [REDACTED] tax year ended. In its [REDACTED] Form 1120 and Form 1120X, [REDACTED] Inc. left blank the first line in which a non-calendar year-end date should have been stated. In the Form 851, Affiliations Schedule, attached to its [REDACTED] Form 1120, [REDACTED] Inc. listed the year-end date as [REDACTED]. Similarly, in the first line of the [REDACTED] Form 1120, [REDACTED] Inc. stated in that the [REDACTED] short tax year began on [REDACTED]. However, in the schedule of additional subsidiaries attached to its [REDACTED] Form 1120 and in its Form 10-K, [REDACTED] Inc. listed its year-end date as [REDACTED]. Similarly, in the Tax Director's [REDACTED] letter to IRS Counsel, she stated that the correct year-end date was [REDACTED].

You have confirmed with the Delaware Secretary of State that [REDACTED] Inc. still exists.

ANALYSIS

For consolidated return years beginning before June 28, 2002, the common parent is the sole agent for each member of the consolidated group. Treas. Reg. § 1.1502-77A(a). The common parent may waive the period of limitations, and that waiver shall be considered as having also been given by each

member of the group. Id.

If the common parent ceases to be the common parent, an alternative agent may waive the period of limitations on behalf of the group. Treas. Reg. § 1.1502-77A(e)(3) (misstated in the LEXIS version as Treas. Reg. § 1.1502-77A(a)(3)). Under paragraph (e)(4), any one of the following corporations may act as an alternative agent for the group:

(i) The common parent of the group for all or any part of the year to which the notice or waiver applies,

(ii) A successor to the former common parent in a transaction to which § 381(a) applies,

(iii) The agent designated by the group under section 1.1502-77[A](d), or

(iv) If the group remains in existence under section 1.1502-75(d)(2) or (3), the common parent of the group at the time the notice is mailed or the waiver given.

Under paragraph (e)(4)(i), [REDACTED] Inc. is an alternative agent because it was the common parent during the [REDACTED] tax year and the [REDACTED] short tax year. Therefore, [REDACTED] Inc. may waive the period of limitations on behalf of the consolidated group for those years.

There are no other alternative agents under paragraph (e)(4). Because [REDACTED] Inc. still exists, there is no successor under paragraph (e)(4)(ii). The consolidated group has not designated an agent under paragraph (e)(4)(iii). The consolidated group did not remain in existence under paragraph (e)(4)(iv) as the result of a mere change in identity or a transfer of assets to a subsidiary. Treas. Reg. § 1.1502-75(d)(2). Nor did stockholders of [REDACTED] Inc. acquire enough stock for this acquisition to be a reverse acquisition. Treas. Reg. § 1.1502-75(d)(3).

You should obtain separate Forms 872-I for each tax year, particularly because the consolidated groups differ in [REDACTED] and [REDACTED].

We recommend that you use [REDACTED] as the [REDACTED] year-end date, as requested by the Tax Director in her [REDACTED] letter, and [REDACTED] as the [REDACTED] year-end date, as requested in her [REDACTED] letter. You should explain in

your cover letter that you are using these dates based on those letters in order that there be no misunderstanding about the periods being extended. However, you should state that your use of these dates on the Forms 872-I does not constitute any recognition by the IRS in any other context that those are the correct year-end dates.

On the Forms 872-I, you should identify the taxpayer as:

██████████ Inc. (EIN ██████████ & Subsidiaries*

* This is with respect to the consolidated income tax liability of ██████████ Inc. & Subsidiaries for the tax year ending [██████████/██████████].

You should identify the corporate signatory as:

██████████ Inc.

The Forms 872 should be signed by the president, vice president, treasurer, assistant treasurer, chief accounting officer, or any other current officer of ██████████ Inc., duly authorized to act on its behalf. I.R.C. §§ 6061(a), 6062; Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305. After the signature line, the name of the signatory and his title should be typed in.

In your transmittal letter to the taxpayer, you should use Form Letter 907 (DO) (Rev. 8-2000). This letter summarizes a taxpayer's right to refuse to sign a consent or to limit a consent. Section 6501(c)(4)(B) requires that "[t]he Secretary shall notify the taxpayer of the taxpayer's right to refuse to extend the period of limitations, or to limit such extension to particular issues or to a particular period of time, on each occasion when the taxpayer is requested to provide such consent."

In accordance with CCDDM(35)3(19)4, we are giving a copy of this memorandum to the National Office for its review. When we hear from the National Office in about ten days, we will let you know whether the National Office agrees with this memorandum. Please call me (213.890.3027, ext. 155) if you have any questions.

This memorandum may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Area Counsel
(Communications, Technology and
Media: Oakland)

By: _____
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Attorney (LMSB)